QUESTIONS PRESENTED

1. Whether a due process violation can be based on a County's failure to prevent physical abuse inflicted by a natural father on his child when the County's sole involvement in the situation is that it had been providing social services to the family in question on a voluntary basis?

2. Whether county officials can be found to have acted with the intent necessary to establish a due process violation when, in the course of providing voluntary social services to a family, the officials concluded that, in their professional judgment, there was an insufficient statutory basis to seek judicial intervention which, in turn, may have led to the termination of a natural parent's constitutionally protected custodial rights?

3. Whether a County and its Department of Social Services can be held liable in a Section 1983 action where the County's express policy is to attempt to protect against the injury that occurred and where the employees who allegedly failed to prevent that injury lacked policy-making authority under state law?

4. Whether county employees are entitled to a qualified immunity in a Section 1983 action where the constitutional violation that they are charged with would be recognized for the first time by this Court in the case involving those employees and where the only relevant, established constitutional rights at the time the employees acted were those of a natural father in not having his relationship with his child improperly terminated?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-154

JOSHUA DESHANEY, a Minor, by his Guardian ad litem, and MELODY DESHANEY,
Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

Respondent Ann Kemmeter, a social worker with the Winnebago County Department of Social Services, first came into contact with Joshua DeShaney on January 22, 1983. (J.A. 95.) On that date, Dr. Gehringer, a pediatrician at the Theda Clark Regional Medical Center, examined Joshua's multiple contusions and recommended that the child be admitted to the hospital because of "possible" child abuse. (J.A. 87, 95.) The hospital then con-

tacted the Department, which in turn requested that an intake worker at the Winnebago County Circuit Court place temporary custody of Joshua with the hospital. (J.A. 88, 96.) Pursuant to the provisions of § 48.025 and § 48.207, Wis. Stats., the request was granted. (*Id.*)

Three days later, the hospital convened a child protection team to consider Joshua's case. (J.A. 88, 96.) [1] After the team discussed the child's condition in detail, the assistant corporation counsel—charged by Wisconsin law with commencing any court action in cases of suspected child abuse, *see* § 48.09, Wis. Stats.—indicated that there was insufficient evidence to take the matter into Juvenile Court. (J.A. 89, 93, 97.) Subsequently, as required by § 48.981(3)(c)(3), Wis. Stats., the Department filed a report with the State of Wisconsin concluding that the suspicion of abuse was "unfounded." (J.A. 89,97.)

Based on the recommendation of the Theda Clark child protection team—and as mandated by Wisconsin law [2]—custody of Joshua was returned to his father, Randy DeShaney, on January 25, 1983. (J.A. 114.) On February 14, 1983, the Winnebago County Juvenile

[1] The team included Dr. Gehringer, Dr. Derozier (a clinical psychologist who had examined Joshua DeShaney), Tom Hoare (the hospital social worker), Respondent Ann Kemmeter, Respondent Cheryl Stelse (Ann Kemmeter's suprevisor), John Bodnar (Assistant Corporation Counsel for Winnebago County), and Keith Nelson (Neenah Police Department detective), along with various other hospital personnel. (J.A. 89, 96-97.)

[2] The Wisconsin statutory scheme required the return of Joshua to his natural father "as soon as is reasonably possible." *See generally* §§ 48.20, 48.21, Wis. Stats. The hospital's temporary physical custody could only have been maintained if a petition initiating proceedings under Chapter 48 of the Wisconsin Statutes had been filed by a "district attorney, city attorney or corporation counsel or other appropriate officials specified under s. 48.09." If a hearing is not held within forty-eight hours, the "juvenile court Commission shall order the child's immediate release from custody." § 48.21(1)(b), Wis. Stats.

Intake Court closed the child protective case; thereafter, the County's involvement with the DeShaney family was on a voluntary "family services" basis. (J.A. 90, 97-98.)

In particular, between February 14, 1983 and March 8, 1984, Ann Kemmeter continued to work with the DeShaney family.[3] The family entered into a voluntary and non-binding "social services agreement" with the Department, specifying the services to be afforded as "Individual and Family Adjustment," "Education," "Employment," and "Health." [4] Respondent Kemmeter thus focused her efforts on proper parenting and appropriate disciplinary techniques, and she observed the family setting when circumstances permitted. (J.A. 99.) During her thirteen months of working with the DeShaney family, she made approximately twelve home visits and attempted five more. (J.A. 98, 99.)[5]

Pursuant to the procedures of the Department of Social Services, Respondent Kemmeter maintained an ongoing case narrative relating to her involvement with the DeShaney family, which is reproduced in the Joint Appendix at 110-46. In this narrative, she expressed her "concern" and "suspicion" related to the possibility of child abuse occurring within the DeShaney family, but also felt that "[n]one of this can be proven, and at this

[3] It was the practice of the Department to keep a specific voluntary family services case assigned to the worker that was originally involved with the case in the child protection services phase, even after the original referral had been deemed "unfounded."

[4] Judge Posner in the decision below incorrectly assumed that the written agreement was entered into pursuant to the provisions of § 48.245, Wis. Stats., and was therefore binding. *See* Pet. App. at 36-37. Because the agreement with Mr. DeShaney was not entered into by an "intake worker" as part of an "informal disposition," however, § 48.245, Wis. Stats. is inapplicable by its terms.

[5] It was Department policy for a caseworker to make one attempted home visit per month on any open family services case. (J.A. 90.)

point of time, none of them [*i.e.*, the injuries] are serious enough to warrant court intervention." (J.A. 118-20.) Respondent Cheryl Stelse, Kemmeter's immediate supervisor, concurred in this conclusion.

Prior to March 9, 1984, there were no further reports of suspected child abuse of the kind that would have been sufficient to trigger an investigation under § 48.981, Wis. Stats. Moreover, at no point after the January 25, 1983, team meeting and prior to March 8, 1984, did Respondents Kemmeter and Stelse ever feel that there was sufficient evidence or facts pertaining to Joshua to take the matter to the Assistant Corporation Counsel for referral to court in an attempt to remove the child from his natural father. (J.A. 91, 99.) [6] On March 8, however, Joshua was taken to the emergency room and operated on after allegedly being beaten by his father. Winnebago County subsequently took custody of Joshua; his father was prosecuted for and convicted of child abuse.

Based on these events,[7] Joshua and Melody DeShaney brought suit against Respondents in the District Court

[6] John Bodnar, the Assistant Corporation Counsel primarily involved in Juvenile Court matters for Winnebago County, has also stated that, after reviewing all of the information and facts assembled by the Winnebago County Department of Social Services from January 25, 1983, up to the alleged incident of March 8, 1984, at no point was there sufficient information or facts presented to pursue Joshua's case in Juvenile Court under § 48.13(3), Wis. Stats. (J.A. 93-94.)

[7] Even when measured against the standards applicable to a summary judgment motion, the inaccuracies and unsupported facts set forth in Petitioners' brief are grossly unfair. A small sampling of these mischaracterizations includes: *Pet. Br. at 4*—Petitioners state that in January, 1983 Joshua was seen in a local emergency room "as a victim of child abuse." This refers to the initial hospitalization when Joshua was admitted because of "possible child abuse," a suspicion that was never confirmed. *Pet. Br. at 5*—Petitioners contend that nothing was done to follow up on a November 30, 1983 "written child abuse report," "despite a clear statutory

for the Eastern District of Wisconsin, alleging violations of the Due Process Clause of the United States Constitution and 42 U.S.C. § 1983.[8] In general, Petitioners

mandate." The written referral, however, was not made pursuant to § 48.981(3)(a), Wis. Stats. Furthermore, the form was not interpreted by others to constitute a formal diagnosis of child abuse. (J.A. 176.) *Pet. Br. at 6*—Petitioners state that a Head Start worker found Joshua at home alone and telephoned the Department on two separate occasions to inform it of his "immediate jeopardy" and that "no action whatever was taken." The Head Start worker on the day of the incident, however, merely left a message with a switchboard operator for Respondent Kemmeter to call. When Kemmeter was eventually able to contact her, she admonish the Head Start worker and advised that it would have been wise for her to either have gone to the police or to another person in the Department so that the message got through. (J.A. 178.) Furthermore, Joshua's parents were confronted with the situation, but they stated that they had just gone to use the pay phone on the corner and were out for only fifteen minutes. (J.A. 180-81.) *Pet Br. at 6*—Petitioners state that Kemmeter observed what "she 's repeatedly described as cigarette burns" on Joshua's face. After a home visit on November 9, 1983, however, Kemmeter indicated only that she had observed marks on the child's chin and "wondered" if they might have been cigarette burns. When the parents were questioned about the matter, they stated that Joshua had been outside and had scraped his chin on the sidewalk. (J.A. 168, 179-80.)

Not to be outdone by the Petitioners' factual recitation, the A.C.L.U.'s *amicus curiae* brief incorrectly states, without any reference to the record, that the "Respondents received no fewer than eleven reports that Joshua was being beaten by his father or other adults in his father's home." They go on to state, again without record support, that "on at least four other occasions, hospital officials who treated Joshua notified the State Protection System that Joshua was being abused."

[8] Melody DeShaney is Joshua's natural mother. After divorce proceedings between Randy and Melody, a Wyoming court transferred legal custody of Joshua to Randy. (J.A. 84-85.) Thereafter, Melody DeShaney never requested that legal custody be transferred back to her. Joshua is presently in the custody of Winnebago County and lives in a group home.

claimed that their injuries were caused by the failure of Respondents, Winnebago County Department of Social Services and its employees, to properly supervise, protect and monitor the welfare of Joshua DeShaney.[9]

The District Court granted Respondents' motion for summary judgment, noting that, if Petitioners' arguments were accepted, "it would provide claims under Section 1983 to Plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression," and that "[e]very social welfare program would become a charter of constitutionally sanctioned social and economic 'rights' which, unlike the civil and political rights traditionally protected by § 1983, require much more than the restraint of governmental power to 'guarantee.'" Pet. App. 55-56.

The United States Court of Appeals for the Seventh Circuit affirmed. In an opinion by Judge Posner, the court concluded that "the state's failure to protect people from private violence or other mishaps not attributable to the conduct of its employees is not a deprivation of constitutionally protected property or liberty. . . . The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services." Pet. App. 39 (citations omitted). In addition, relying on this Court's decision in *Martinez v. California*, 444 U.S. 277, 285 (1980), the Court of Appeals further held that a "deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff." Pet. App. 42. Disagreeing

[9] Despite these allegations, Petitioners acknowledge that, as stated in their complaint, "[a]t all relevant times to and until March 8, 1984, Joshua DeShaney was in the custody and control of Defendant, Randy DeShaney." (J.A. 6.)

with the Third Circuit's decision in *Estate of Bailey by Oare v. County of York*, 786 F.2d 503 (1985), the Seventh Circuit stated that "[w]e can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship.'" Pet. App. at 43.

SUMMARY OF ARGUMENT

This case involves a Section 1983 claim for damages based upon the alleged failure of a County and its employees to protect a child from abuse inflicted by his father. Petitioners' claim is barred for several independent legal reasons, each of which requires affirmance of the judgment below.

1. Petitioners have failed to show any constitutional deprivation by a state actor, an essential prerequisite in a Section 1983 case based on an alleged violation of the Due Process Clause. The harm to Joshua DeShaney was inflicted by his father, whose actions were not merely independent of any governmental entity or person, but in flat derogation of government policy, as Petitioners themselves concede. Pet. Br. at 19. To fill this fatal void, Petitioners attempt to fashion a new constitutional duty, supposedly based on a "special relationship"—*i.e.*, that the Respondent County had undertaken to provide child protection services and that the government officials performing these services were aware of Petitioner's potential plight but failed to protect him. This effort to transform a privately inflicted harm into a governmental deprivation stretches the Due Process Clause well beyond its breaking point.

Petitioners recognize, as they must, that "there is no generalized duty on a state or municipality to provide affirmative protection to members of the public at large." Pet. Br. at 12-13. Nor is there any warrant for requiring a state or county that wishes to provide family services to do so at its constitutional peril. Whether those

services ultimately accomplish their goal will depend on a variety of factors, many of which are clearly beyond the government's power to control. Moreover, the efficacy of any such governmental program necessarily depends in part on the availability of funding and thus implicates complicated allocative decisions that cut across the spectrum of public services. In these circumstances, the government's inability to achieve perfection simply cannot be equated with the kind of "affirmative abuse of power" needed to establish a due process violation. *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring)).

The cases relied on by Petitioners and their supporting *amici* are simply inapposite. The government here neither inflicted the injury, *see, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977), nor otherwise deprived Petitioner of his liberty, thereby creating ancillary constitutional obligations to provide affirmative services like medical care or a safe environment. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976). The government's action in those cases —either through direct infliction or through an initial deprivation of liberty that both renders an individual wholly dependent upon the government for protection and provides the government the degree of control necessary for it to afford reasonably effective protection— is properly viewed as sufficient to make out a "deprivation in the *constitutional sense*." *Daniels, supra*, 474 U.S. at 329 (quoting *Parratt, supra*, 451 U.S. at 548 (Powell, J., concurring)) (emphasis in original). But where all that the government has done is to provide voluntary family counseling in a case that involves a privatey inflicted injury, the resulting harm is "too remote a consequence" of governmental action to make out such a deprivation. *Martinez, supra*, 444 U.S. at 285.

2. Even assuming that Petitioners had properly alleged a constitutional deprivation, their claims would still be barred because they do not, and could not, show that Respondents acted with the requisite "state of mind" for a due process violation. The Fourteenth Amendment constrains only "real *abuses* by state officials in the exercise of governmental powers," *Parratt, supra*, 451 U.S. at 549 (Powell, J., concurring) (emphasis in original), and therefore demands a high level of intent before liability may be imposed. The appropriate standard in a case like this one—which involves a claim of government *inaction* and requires the balancing of a child's potential rights against those of his family—should be the "deliberate indifference" test. *See Estelle, supra*. The alternatives proposed by petitioners—gross negligence or recklessness—readily blur into the negligence standard previously rejected by this Court, *see Daniels, supra*, 474 U.S. at 330; *Davidson v. Cannon*, 474 U.S. 344 (1986), and simply do not reflect the kind of "*deliberate* decisions of government officials" required by the Due Process Clause. *Daniels, supra*, 474 U.S. at 331 (emphasis in original) (citations omitted).

In the present case, it cannot plausibly be claimed that Respondents acted with deliberate indifference toward any rights that Petitioner may have had. On the contrary, for more than a year they provided voluntary counseling to the DeShaney family. In that capacity, while remaining attentive to the child's situation, Respondents also had to be respectful of the constitutional rights of a natural parent regarding the privacy and integrity of family life. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). With the benefit of hindsight, it may now be said that a tragedy occurred. But that tragedy was hardly the product of any purposeful or deliberate indifference on the part of Respondents. *See Davidson, supra*, 474 U.S. at 348.

3. The County and its Department of Social Services must be dismissed for the separate reason that Petitioners can point to no policy or custom directly leading to the alleged violation of their rights. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). On the contrary, even Petitioners have acknowledged that "the state and county had expressed specific policies and intentions *to seek out and prevent child abuse.*" Pet. Br. at 19. (emphasis supplied). In the face of this recognition, the highly discretionary decisions of front-line social workers—who lacked any policymaking authority under state law (§ 46.22, Wis. Stats.)—provide no basis for holding the county Respondents liable. *See City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988) (plurality opinion); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (plurality opinion).

4. Finally, the individual Respondents in this case are further protected from liability on the basis of the qualified immunity doctrine. Under that doctrine, an official cannot be held responsible in a damages action unless it can be shown that he or she violated a "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The right at issue in this case was anything but clearly established, as the decisions by both courts below and numerous others amply demonstrate.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL VIOLATION IN THIS CASE BECAUSE THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES DID NOT DEPRIVE PETITIONERS OF THEIR LIBERTY.

To state a claim under Section 1983, a plaintiff must both allege the violation of a right secured by the Constitution and laws of the United States and show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 108 S. Ct. 2250, 2255-56 (1988). The Court has thus instructed that "the first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting Section 1983).

Petitioner has stumbled at this threshold. Rather than demonstrating that Respondents have deprived him of a protected interest, he is able only to indicate that the Constitution accords him a liberty interest in personal security. But the identification of a constitutionally protected interest constitutes only half of a Section 1983 claim. The Due Process Clause does not protect citizens against harms inflicted by private parties, but only against deprivations of individual liberties at the hands of the government. Petitioner has failed to demonstrate that it was Winnebago County or its employees who deprived him of the constitutionally protected interest that he asserts.

A. The Constitution Imposes No General Duty On The Government To Protect Its Citizens From Private Violence.

The injuries for which Joshua DeShaney seeks redress were all inflicted by his father while Petitioner was living at home. Petitioner is thus in the same position as any other citizen who is the unfortunate victim of crime. His injury was not inflicted by the State, nor did it

occur at a time when the State had deprived him of his liberty or otherwise burdened his constitutional rights. Because the Due Process Clause imposes no obligation to protect a citizen at liberty from harms committed by private parties, Petitioner has failed to state a claim under Section 1983.

Petitioner virtually concedes that his claim falls outside the purview of the Constitution when he recognizes, as he must, that "there is no generalized duty on a state or municipality to provide protection to members of the public at large." Pet. Br. at 12-13 (citing *Martinez, supra*). *See Youngberg, supra*, 457 U.S. at 317 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."). Although the State may not itself invade an individual's personal security, it is not compelled by the Constitution to prevent private action from having the same effect.

The Court has thus repeatedly held that the Constitution does *not* provide an affirmative right to governmental aid, even in the pursuit of those interests that the government may not itself deprive. For example, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court explicitly rejected the argument that "because government may not prohibit the use of contraceptives, or prevent parents from sending their children to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or to send their children to private schools." *Id.* at 318 (citations omitted). *See also Maher v. Roe*, 432 U.S. 464, 469 (1977) (no constitutional right to public funding of abortion); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (same for housing).

The Court has also specifically indicated that there is no affirmative constitutional obligation on the government to provide protective services. In *Turner v. United*

States, 284 U.S. 354, 358 (1919), for example, in an opinion by Justice Brandeis, the Court denied a claim for compensation arising from damages caused by mob violence, noting the "lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." The same principle underlies the more recent decision in *National Board of Y.M.C.A. v. United States*, 369 U.S. 85 (1969), where a Fifth Amendment Takings Clause claim was denied for the damage done to buildings under protective occupation during a riot in the Panama Canal zone. As Justice Harlan wrote in concurrence, "[e]very man who was robbed on the street cannot demand compensation from the government on the ground that the Fifth Amendment requires fully effective police protection at all times." *Id.* at 95.[10]

As these cases demonstrate, a plaintiff cannot avoid the constitutional requirement of state, rather thn private, action merely by rephrasing his Complaint to at-

[10] Not surprisingly, the Courts of Appeals are in unanimous agreement that the Constitution imposes no general duty on the States to provide protective services. In *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720 (1st Cir.), *cert. denied*, 107 S. Ct. 270 (1986), Judge Campbell concluded that "[n]othing in the fourteenth amendment or its history . . . suggests that it was written to provide an expansive guarantee of State protective services." Judge Posner, in addition to the opinion below, has stated that there is "no constitutional right to be protected by the State against . . . criminals or madmen," and in corollary, because there is no "constitutional duty [on the State] to provide such protection its failure to do so is not actionable under Section 1983." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The same point was later amplified by Judge Easterbrook in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1987) (en banc). *See also Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1033-34 (11th Cir. 1987); *Ketchum v. Alameda County*, 811 F.2d 1243 (9th Cir. 1987); *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983); *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983).

tack official failures to prevent private deprivations. Allowing that kind of broad expansion of due process protection would not only do violence to the text of the Clause, it would also drastically alter the role of the Constitution in ordering governmental action. As the Court has explained:

> Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and Federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (emphasis supplied).

In sum, far from being an instrument to ensure that States act to protect their citizens, the Due Process Clause was intended to prohibit "real *abuses* by state officials in the exercise of governmental powers." *Parratt, supra*, 451 U.S. at 549 (Powell, J., concurring) (emphasis in original); *see also Daniels, supra*, 474 U.S. at 327; *Davidson, supra*, 474 U.S. at 344, 347; *Parratt, supra*, 451 U.S. 544-45 (Stewart, J., concurring).

B. There Is Insufficient Government Action In This Case To Transform Petitioners' Private Injury Into a Constitutional Deprivation.

In lieu of a general claim that a lack of protection deprived them of liberty, Petitioners attempt to narrow their position by arguing that a duty "arise[s] out of the relationship created or undertaken by the state with respect to certain parties." Pet. Br. at 13. While we agree that such a duty may be created by certain kinds of state action, the requisite state involvement is not present in this case. On the contrary, a constitutional

duty to provide protection against private harm can only arise in circumstances where the government, by its own action, has deprived an individual of his or her liberty. In that circumstance, the State may have affirmatively rendered the individual wholly dependent upon it for basic protection and, by reason of such deprivation, assumed the degree of control that enables it to provide reasonably effective protection.

1. *The General Requirement That The State Must Actively Inflict Injury Before It May Be Held Liable For A Constitutional Violation Flows Directly From The Due Process Clause As Well As The Provisions Of Section 1983.*

Under both the "state action" requirement of the Due Process Clause and the "causation" requirement of Section 1983, the government cannot be held liable for harm to a citizen at liberty unless it actively inflicts the injury. Even though the government may seek to prevent the very harm that results from third-party actions, its efforts in that regard are insufficient to justify the imposition of constitutional liability. Rather, in such circumstances, the injury for which the Plaintiff seeks redress is simply "too remote a consequence of [official's] actions to hold them responsible under the federal civil rights laws." *Martinez, supra*, 444 U.S. at 285.

This Court's proscription against attempting to "constitutionalize" such "remote consequences of official action" was firmly set forth in *Martinez*, a case involving a homicide committed by a parolee five months after his release. Noting that "it is perfectly clear that not every injury in which a State official has played some part is actionable under [Section 1983]," the Court explained:

> Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of State

> tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.

Id. at 284-85 (citations omitted).

This conclusion is fully consistent with the Court's general jurisprudence in the "state action" area. Indeed, that requirement is specifically designed to separate constitutional wrongs from private ones. Although the inquiry essentially involves a case-by-case, fact-bound determination, it is nonetheless clear that private action may be attributed to the State only when the private ends were accomplished "with the overt, significant assistance of state officials." *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340, 1345 (1988).[11]

Applying the factors that are generally considered in determining whether there has been state action, it is apparent that *none* of the traditional indicia is present here. For example, child abuse is hardly "the exclusive prerogative of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982), and Respondents' attempts to intervene in Joshua's situation belie any assertion that his father was a "willful participant in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966), or that there was a "symbiotic relationship" between him and the County or any of its agents. *Burton v. Wilmington Parking Authority*, 365 U.S. 715

[11] *Compare Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (no State action in private creditor's lawful self-help pursuant to the Uniform Commercial Code) *with Lugar, supra*, (ministerial State involvement implicates State action in private creditor's collection action) *and North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (same) *and Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (same).

(1961). Rather, as the course of the County's investigation demonstrates, Mr. DeShaney was a suspect for child abuse—he was thus "not acting on behalf of the State; he [was] the State's adversary." *Dodson, supra*, 454 U.S. at 323 n.13.

The constitutional requirement of state action, in short, is not met when the government's efforts at providing protection, even if ultimately ineffective, do not render the intended beneficiary any worse off. As Justice Harlan explained in an analogous situation, the proper standard for allowing a Takings Clause claim for damage that was not prevented by an attempt at military protection is "when the military had reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all." *National Board of Y.M.C.A., supra*, 395 U.S. at 95 (emphasis in original). According to Justice Harlan, it would be anamolous to allow no compensation to owners of unprotected property, yet allow it for those whose property was inadequately protected. "It is only if the military or other protective action foreseeably *increased* the risk of damage that compensation should be required." *Id.* at 96 (emphasis in original). By the same token, because the Fourteenth Amendment imposes no duty on States to provide any protective services at all, it would be equally anamolous to predicate liability on what is alleged to be the ineffective provision of such services.

These basic principles of due process analysis are further reinforced by the "causation" requirement established under Section 1983. By its terms, that statute applies only to a defendant who "subjects or causes to be subjected" any citizen to a constitutional deprivation. The Court has made clear that the mere failure to prevent action by another party is insufficient to meet this requirement. "[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused'

A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent." *Monell, supra*, 436 U.S. at 692. *See also City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1119-21 (1987) (O'Connor, J., dissenting).[12] Indeed, even when it enacted Section 1986—the provision that does provide a cause of action for a failure to prevent private deprivations of civil rights[13]—Congress specifically *excluded* municipalities from the purview of that statute, explaining that the "Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities." *Monell, supra*, 436 U.S. at 673.[14]

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[12] The debates on Section 1983 also suggest that this provision was intended to redress only active infliction and not State inaction. For example, Representative Bingham, the author of Section One of the Fourteenth Amendment, stated in the debates on Section 1983 that "[t]he States never had the right, though they had the power, to inflict wrongs upon free citizens." *Quoted in Monell, supra*, 436 U.S. at 685 n.45. He then chronicled several direct governmental deprivations that were covered by the statute, none of which were remotely similar to the claim in this case. The only indication of liability under Section 1983 for governmental inaction concerned equal protection violations, where a State denies services for discriminatory reasons. *See* remarks of Rep. Garfield, *quoted ibid.* The facts of this case implicate no such invidious discrimination.

[13] In relevant part, Section 1986 provides liability for "[e]very person who, having knowledge that [a conspiracy to violate civil rights is afoot], and having power to prevent or aid in preventing the Commission of the same, neglects or refuses so to do. . . ." Because Section 1986 specifically incorporates Section 1985, it applies only to cases involving racial or similar animus, *see Griffen v. Breckenridge*, 403 U.S. 88 (1971), and thus has no conceivable relevance to the present case.

[14] The legislative debates leading to the rejection of the so-called "Sherman Amendment," which would have included municipalities within the reach of Section 1986, is reviewed in detail in *Monell, supra*, 436 U.S. at 665-84. That discussion also fully supports the conclusion that section 1983 was not intended to apply to municipal failure to protect against the private infliction of harm.

Adherence to an "active infliction" requirement, moreover, provides the essential rationale for the ruling in *Monell* itself, where the Court held that local governments may be found liable under Section 1983 but not on a *respondeat superior* basis. If mere failure to protect were sufficient to impose liability, all Section 1983 violations perpetrated by municipal officials would lead to municipal liability on the theory that the government failed to protect the individual from its official's action. Under *Monell*, however, "it is when execution of a government's policy or custom . . . *inflicts* the injury that the government as an entity is responsible under Section 1983." *Id.* at 694 (emphasis supplied). Whatever debates have raged since *Monell* concerning when a municipality has so acted, *see, e.g., Praprotnick, supra*; *Tuttle, supra; City of Canton v. Harris, pending*, No. 86-1088, this central proposition remains essentially unchallenged.[15] Because Section 1983 liability must be predicated on active infliction, a municipality cannot be held liable for the constitutional torts of employees over whom it has "the mere right to control without any control or direction having been exercised." *Monell, supra*, 436 U.S. at 694 n.58.

The Section 1983 requirement that a Defendant actively inflict harm was also relied on in *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court refused to find constitutional liability premised on the failure of a city police department to act in the face of an alleged pattern of violations by individual officers. That theory was

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[15] *But see Praprotnick, supra*, 108 S. Ct. at 924 n.1 (Stevens, J., dissenting); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 n.4 (1986) (Stevens, J., concurring); *Tuttle, supra*, 471 U.S. at 834-44 (Stevens, J., dissenting).

deemed insufficient precisely because the department itself did not actively inflict the harm, and hence it caused no constitutional deprivation.[16] The Court thus distinguished *Rizzo* from *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), noting that in the latter case, "segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played *no affirmative part* in depriving any member of the two respondent classes of any constitutional rights." 423 U.S. at 377 (emphasis supplied). For the same reasons, Respondents in this case do not fall on the liability side of the "affirmative" deprivation line drawn in *Rizzo, supra.* Petitioners' claimed violation notwithstanding, none of the Respondents can properly be "found by their *own* conduct . . . to have denied those rights." *Ibid.* (emphasis in original).

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[16] As the Court stated in *Rizzo*:

> The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active centage of the police force, petitioners' failure to act in the conduct enjoined in *Hague* [*v. CIO*, 307 U.S. 496 (1939)] and [*Allee v.*] *Medrano* [, 416 U.S. 802 (1974)]. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions and we decline to do so now.

423 U.S. at 375-76 (emphasis in original).

This active infliction requirement—common to both state action under the Fourteenth Amendment and causation under Section 1983—is especially important in a case such as this, where governmental services have been provided but are argued to have been inadequate. "It would be ironic that when a State embarks on such a desirable experiment it thereby opens the door to scrutiny by the Federal Courts, while States that choose not to adopt such [laws] entirely avoid the strictures of the due process clause." *Hewitt v. Helms*, 459 U.S. 460 (1983). An active infliction requirement thus serves the important function of differentiating between the provision of imperfect services and the abuse of government power with the intention to oppress, only the latter being within the province of the Fourteenth Amendment. *See generally, Daniels, supra; Davidson, supra.*[17]

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[17] The active infliction requirement has generally been followed by all but one of the Circuits, although two others in dicta have allowed for the possibility of broader liability. The District of Columbia, First, Second, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits have all found that the State is constitutionally obligated to provide protection only when the State has actively inflicted harm by putting that individual in a worse position than he would have been in had the State not been involved. *See Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.) *cert. denied*, 107 S.Ct. 270 (1986); *McClary v. O'Hare*, 786 F.2d 83, 88-89 (2nd Cir. 1986); *Doe v. New York Dep't of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Rankin v. City of Wichita Falls*, 762 F.2d 444, 449 (5th Cir. 1985); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987); *Bradberry v. Pinellas County*, 789 F.2d 1513, 1517 (11th Cir. 1986).

Somewhat less settled is the rule in the Fourth and Ninth Circuits, whose holdings comport with this test but, under the aegis of "special relationship," allow in dicta that "a right to protection

Judged against these established principles, Petitioners' suggested criteria, *see* Pet. Br. at 14-15, must be rejected as an unprecedented theory of Section 1983 liability that drifts free of any constitutional or statutory moorings. The criterion of *prior* custody is clearly too broad to reflect active State infliction of harm. Obviously, the State does not become a lifetime guarantor of an individual's safety by having once taken him into custody. Thus, while current custody means that the State is depriving an individual of his liberty and therefore may be required to provide protection during the time of actual deprivation, *see* pp. 24-26 *infra*, post-release reliance on prior custody fails to distinguish between a cause that is direct and one that is too removed in time and consequence to have any constitutional bearing. *See Martinez, supra.* By the same token, the State's expressed desire to help children through the provision of protective services can in no way be seen as contributing to, let alone as inflicting, abuse on a child. If anything, such a policy stands as an impediment to that result. And even though the State may have knowledge of a child's potential plight, that knowledge neither caused the child's problem, worsened it, or made it more likely to occur.[18]

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could arise from a custodial *or other relationship.*" *Jensen v. Conrad*, 747 F.2d 185, 194 & n.11 (4th Cir. 1984) (emphasis in original), *cert. denied*, 470 U.S. 1052 (1985); *Fox, supra*, 712 F.2d at 88; *see also Ketchum, supra*, 811 F.2d at 1247 (noting awareness of specific risk of harm as possible basis of duty in addition to custody or placing victim in danger).

The Third Circuit in *Bailey, supra*, on which Petitioners have placed continued reliance, thus stands alone. It is the only Circuit to have applied a test of broader liability for the failure to provide protective services. It should be noted, however, that the author of *Bailey* may have limited even that holding when it was later distinguished in *Commonwealth Bank and Trust Co. v. Russell*, 825 F.2d 12, 16 (3rd Cir. 1987).

[18] Petitoners claim that:

> Only the DSS is authorized (or required) to investigate the suspicion of abuse or neglect, and only the DSS is empowered to do anything about it, including bringing the matter to court for hearing and determination. *Every other person outside DSS, although obligated to report to DSS, is utterly disabled from acting on behalf of the endangered child.* Everything must go to DSS, and only DSS is authorized to act.

Pet. Br. at 27 (emphasis supplied). Even if true, this assertion would not make the State's action sufficient to amount to a deprivation.

The assertion is also incorrect, however. Chapter 48 of the Wisconsin Statutes (a portion of which are appended to Petitioners' Brief) indicates that the persons enumerated therein, having reasonable cause to suspect child abuse or neglect, shall contact the County agency *or* Sheriff *or* City Police Departments. *See* § 48.981 (2) and (3), Wis. Stats. Furthermore, any person suspecting abuse or neglect may request an immediate investigation by the *Sheriff* or *Police* Department. *See* § 48.981(3)(b)1, Wis. Stats. Finally, contrary to Petitioners' representation, it is not the Department that has the final authority "to act," but rather it is the Corporation Counsel who is charged with the responsibility of seeking Court intervention. *See* 48.09. And it was Assistant Corporate Counsel John Bodnar who, in this case, decided against that option. *See supra* at 2, 4 n.6.

In sum, the specific governmental actions relied on by Petitioners are not sufficiently related to the harm he alleges to warrant converting a private wrong into a "constitutional deprivation" cognizable under Section 1983. While these kinds of considerations may possibly have relevance to a general tort law claim, *see Martinez, supra*, 444 U.S. at 284-85, the Court has repeatedly "rejected reasoning that would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels, supra*, 474 U.S. at 332 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). There is no justification for departing from this settled approach in the instant case.

2. *Only Where A State Has Deprived A Person Of His Liberty, And Thereby Assumed Responsibility For That Person's Welfare, May An Affirmative Duty To Protect Against Conduct By Third Parties Arise.*

There is one exception to the basic rule that requires the State to have affirmatively inflicted the harm for which an individual seeks redress under the Due Process Clause: *i.e.*, where harm is inflicted at a time when the State has burdened an individual's constitutional interests by depriving that person of his liberty.[19] Under such circumstances, a State may be made to assume certain substantive due process obligations that it would not otherwise have. This exception is not applicable in the instant case, however, as the private harm was not inflicted upon the Petitioner at a time when his liberty interests were being compromised by any action of the State.

The cases from this Court primarily relied upon by Petitioners and their supporting *amici* all fit within this recognized exception. Far from supporting Petitioners' position, these cases demonstrate that certain narrowly defined substantive rights arise from a prior deprivation that places the individual in an environment created by the State and where the State has made him dependent on it as a direct result of that initial deprivation. Only when such a deprivation "renders a person vulnerable and strips him of his ability to defend himself" may subsequent injury—even if not directly inflicted by a state actor—be fairly attributed to the State. *Davidson*, *supra*, 474 U.S. at 355 (Blackman, J., dissenting).

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[19] This Court has also noted that, even where such narrowly defined circumstances exist, the State shall "necessarily have considerable discretion in determining the nature and scope of its responsibilities." *Youngberg*, *supra*, 457 U.S. at 317.

Thus, in *Estelle*, *supra*, for example (Pet. Br. at 9, 12, 29), the Court held that the Constitution imposes an affirmative obligation on prison officials to provide medical care to convicts even though there is clearly no general obligation on the State to provide such services to its citizens. *See Maher v. Roe*, *supra*. Having taken a prisoner into custody, the State effectively removes his ability to secure self-help and forces him to "rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, *supra*, 429 U.S. at 103. As the Court elaborated last Term, when the State fails to provide care in this situation, "the resultant deprivation was caused, *in the sense relevant for state-action inquiry*, by the State's exercise of its right to punish [an individual] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *West*, *supra*, 108 S. Ct. at 2259 (emphasis supplied). The same rationale also supports the decision in *Youngberg*, *supra*, where the Court first reaffirmed its general rule that "a state is under no constitutional duty to provide substantive services for those within its border," and then noted the narrow exception to this rule in situations where "a person is *institutionalized and wholly dependent* upon the state." 457 U.S. at 317 (emphasis supplied).

The rationale for this exception has no applicability to the instant case, however. The harms inflicted on Petitioner occurred not when he was in state custody, but rather while he was at liberty. Having created no affirmative obligation through an initial deprivation, therefore, the State was not burdened with the obligation—nor, indeed, endowed with the ability—to protect Petitioner against the unfortunate perils that face those who remain at liberty. It was thus free to attempt to monitor his situation and to help, if possible, without exposing itself to constitutional liability if its efforts ultimately proved to be unsuccessful.

The rule that Petitioners have proposed, by contrast, would place increasing pressure on state agencies to *interfere* with individual liberty by removing children from their families out of fear that, otherwise, the State will be held liable for the resultant harms.[20] Whatever may be said of the wisdom of such an approach, it is a curious result to look for in the Due Process Clause. The essence of that provision is to *prevent* government intrusions on individual liberty. In enshrining that preference, it is not as if those who wrote the Bill of Rights did not realize that citizens could face great danger when left at liberty. Rather, they concluded that these privately created perils, unlike those that could be inflicted by the government, were not of constitutional concern. The approach that Petitioners urge in this case would turn this constitutional understanding on its head.

C. State Law Does Not Create A Liberty or Property Interest Applicable To This Case.

Petitioners also argue that the laws of Wisconsin grant him a constitutionally protected liberty or property interest in protection from harm. This position must be rejected for a number of independent reasons. To begin with, the argument has been raised for the first time in Petitioners' brief to this Court. It was not pled in the Complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the Petition for Certiorari. Given both the inherent uncertainty

[20] As characterized by Judge Posner in the opinion below, it would be inappropriate to force the federal courts into such an arena. "Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities." Pet. App. at 44. To do otherwise would "place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a § 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a § 1983 suit by the child." *Id.* at 44-45.

of how Wisconsin will interpret its own law and the lack of any guidance on this issue from the lower federal courts, this Court should not now consider this putative basis for reversal. *See, e.g., Youngberg, supra,* 457 U.S. at 316 n.19 (citing cases).

Were this argument properly before the Court, it would have to be rejected nonetheless. While the contours of Petitioners' position are hard to discern from their brief, they appear to argue that Wisconsin law has created a liberty or property interest in state-provided protection against child abuse that must be accorded procedural protection under the Due Process Clause. Such a procedural claim, in any event, is the only one that can even be plausibly pertinent to a Section 1983 action because, generally speaking, ". . . illegality under the state's statute can neither add to nor subtract from [an action's] constitutional validity. Mere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes,* 321 U.S. 1, 11 (1944); *see also Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

Even properly stated, Petitioners' claim for a state-created liberty or property interest is insupportable for several reasons. To begin with, the Wisconsin legislature did not use the requisite language to signal its intent to create the kind of right that Petitioners now claim.[21]

[21] In fact the Wisconsin legislature has expressed its intent to the contrary. *See* § 48.981(4), Wis. Stats., which provides:

> IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child under this section [§ 48.981, Wis. Stats., the text of which is included in Petitioners' appendix] shall have immunity from any liability,

Because state law generally does *not* create constitutionally protected interests, *see, e.g., Olim v. Wakinekona*, 461 U.S. 238, 251 (1983), an expectation is subject to due process requirements only when state law uses "language of an unmistakably mandatory character" and, with equal particularity, enumerates "specific substantive predicates" to its deprivation. *Hewitt v. Helms, supra*, 459 U.S. at 471-72; *see also Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring).

The Wisconsin law relied on by Petitioners does not satisfy this stringent standard. It contains no requirement that child protection officials effectively intervene in all cases of suspected abuse, nor does it purport to afford specific substantive rights to suspected victims of abuse. At most, it requires only an investigation and subsequent report, such as were undertaken in this case. The filing of a "Petition to Terminate Parental Rights," in contrast, is left to the prosecutorial discretion of the District Attorney, City Attorney or Corporation Counsel. Moreover, such a Petition may be granted by the court only if the facts alleged have been proved by clear and convincing evidence. *See* §§ 48.13(3), 48.25, 48.31, Wis. Stats. These discretionary standards are plainly not sufficient to make out an enforceable due process interest.

Moreover, even if Wisconsin law were to have created a liberty or property interest applicable to this case, Petitioners wholly misunderstand the significance of such a conclusion. In that situation, Petitioners would be entitled at most to *procedural* due process protections, not substantive constitutional protections. As Justice Powell has explained, "[w]hile property interest are protected by procedural due process even though the

civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed. The immunity provided under this subsection does not apply to liability for abusing or neglecting a child.

interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), substantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). In view of this critical distinction, it is necessary to look at the procedural due process afforded by Wisconsin in the current situation, a matter completely ignored by Petitioners.

It is undisputed that Wisconsin provides those in Petitioners' position with a common law tort remedy for damages. Such a post-deprivation remedy is sufficient to satisfy due process requirements. *See Ingraham, supra*, 430 U.S. at 674-82. Requiring a pre-deprivation hearing would obviously make no sense in this context. *See Parratt, supra*, 451 U.S. at 543-44; *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). Thus, the Court has previously explained that there is no constitutional mandate for a prior hearing in the "many circumstances in which the state's conduct, if not adequately justified, would constitute a common law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the Fourteenth Amendment encompasses the same liberties as those protected by the common law." *Ingraham, supra*, 430 U.S. at 679 n.47 (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977)). Since Wisconsin's tort law remedy satisfies this standard, it meets any procedural due process requirement that might obtain in the present case.[22]

[22] The fact that Wisconsin law places a $50,000 cap on recoveries in cases like the instant one, § 893.80(3), Wis. Stats., does not render this remedy constitutionally insufficient. This cap applies to all governmental liability in Wisconsin and provides a legitimate balance between individual compensation and the government's finan-

II. THE ALLEGED INACTION OF THE RESPONDENTS DOES NOT EVINCE THE STATE OF MIND NECESSARY TO INVOKE FOURTEENTH AMENDMENT PROTECTIONS.

As we have just shown, Petitioners have failed to establish any deprivation of a constitutional nature. Accordingly, as the decisions of the courts below both concluded, it is not necessary in this case to reach the issue of the "state of mind" of the Respondents. In the event that this Court does reach that issue, however, we believe that the alleged inaction of the Respondents does not evince the state of mind necessary to invoke the protections of the Fourteenth Amendment. On that basis as well, the judgment below must be affirmed.

This Court's most recent pronouncements on the state of mind requirement in the context of the Fourteenth Amendment are found in *Daniels* and *Davidson*. In *Daniels*, for example, the Court noted that the Due Process Clause concerns itself with governmental power that is "used for purposes of oppression" or where there is "abusive governmental powers." 474 U.S. at 331-32. It therefore emphasized that historically the Due Process Clause has been applied to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* at 331 (emphasis in original).

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cial concerns. *See Archie, supra*, 847 F.2d at 1219 ("[a] higher limit on recoveries would induce the government to take more care, but it might also induce it to cut back on rescue services, helping [plaintiff's] heirs at the expense of those in need in the future. The Constitution does not require the state to hew to the best balance between effective care and expensive care—even if we knew what the best balance is. Dissatisfaction with the outcome of such a political choice is not a sufficient ground for declaring the structure unconstitutional."). *See generally Daniels, supra*, 106 S. Ct. at 680 (Stevens, J., concurring) ("Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation.").

Negligence in whatever form, whether slight, gross or denominated as "recklessness," does not amount to conduct that is "deliberate." Nor does it rise to conduct "used for the purpose of oppression." The government simply cannot attempt to oppress without an intent to do so—especially in a "failure to protect" situation, where it is necessary to distinguish between a decision not to devote limited resources to a particular task, on the one hand, and a decision to oppress particular individuals, on the other. Moreover, in this case, this difficult assessment of intent must also be made in a context where a child's alleged "right to be protected" needs to be balanced against the directly competing constitutional interests of his parents.[23]

In view of these considerations, we believe that the "deliberate indifference" test is the appropriate intent standard by which to measure a constitutional claim in the present circumstances. To trigger the protections of the Fourteenth Amendment, any failure to act must be based on a state of mind such that the actor can fairly be said to have deliberately and purposefully disregarded the constitutionally protected rights of another. Only that kind of conscious indifference to the rights of another can be fairly said to equate itself with conduct that is employed "as an instrument of oppression" or that amounts to "abusive governmental conduct." *See Davidson, supra*, 474 U.S. at 348. Indeed, the Court has already adopted this standard under the Eighth Amendment in cases involving the denial of medical care to prisoners. *See Estelle, supra.*

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[23] The Court has previously recognized a parent's "commanding" interest in maintaining his or her parental status, including the "companionship, care, custody and management of his or her children." *See Santosky v. Kramer*, 455 U.S. 745, 758-59 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) and *Stanley, supra*, 405 U.S. at 651.

To predicate due process protections on a distinction as artificial as that between negligence and "gross" negligence (or "recklessness")—as Petitioners would do—would be to overrule *Daniels* and *Davidson sub silentio*. The line between these varying standards is simply too imprecise to provide any meaningful constitutional guidance, especially in a case predicated on governmental inaciton.[24] It is common knowledge that plaintiffs in such cases routinely plead that the failure to act was either negligent, grossly negligent or reckless, the latter standards supposedly reflecting greater degrees of inattention. But none of these standards would require a showing of purposeful or deliberate governmental action, which is the touchstone of *Daniels* and *Davidson*. *See also Parratt*, *supra*, 451 U.S. at 548 (Powell, J., concurring).

In the present case, there is no basis for suggesting that Respondents acted with deliberate indifference toward the constitutional rights of Petitioner.[25] On the

[24] *See, e.g.*, Prosser and Keeton, *The Law of Torts* § 34 (5th Ed. 1984) for a discussion of the vague and impracticable distinction between negligence and "gross" negligence. *See also Archie*, *supra*, 847 F.2d at 1219, where the court, addressing this identical issue, notes:

> Gross negligence blends into negligence; there is an indistinct and unusually invisible line between benefits exceeding the cost of precautions (negligence) and benefits substantially exceeding the costs (gross negligence). The malleable quality of these terms has produced scoffing among many, who see gross negligence as simply negligence 'with the addition of a vituperative epithet.' A line that cannot be policed is not a line worth drawing in constitutional law.

(citations omitted).

[25] The fact that the courts below did not make a finding concerning deliberate indifference does not preclude this Court from deciding that, drawing all inferences in favor of Petitioners, Respondents in this case did not act with this level of intent. *See Estelle*, *supra* (announcing the deliberate indifference standard for certain Eighth Amendment violations and finding without remand that it was not met).

contrary, they continued to monitor his situation for over a year. They clearly considered the matter to be serious but concluded, based on the exercise of their professional judgment, that there was insufficient evidence to demonstrate "child abuse" under the "clear and convincing" standard, which is mandated by both Wisconsin law and the Constitution before parental rights may be terminated. *Compare* § 48.31, Wis. Stats., *with Santosky v. Kramer*, 455 U.S. 745, 769 (1982). Indeed, Respondents were not only *not* indifferent to Petitioner's plight, they also acted with sensitivity to the parental rights at stake here—*i.e.*, "to conceive and raise one's children[, which] have been deemed 'essential' 'basic civil rights of man,' and '[r]rights far more precious than property rights.'" *Stanley*, *supra*, 405 U.S. at 657 (citations omitted).[26]

It cannot be gainsaid that Respondents operate in a highly charged human services area. Each day they are forced to balance the needs and interests of children against those of their parents. *Cf. McNamara v. San Diego Dep't of Social Services*, *pending*, No. 87-5840. Aside from having to make enormously difficult decisions, Respondents also face an equally treacherous task in attempting to secure important information. Although Petitioners repeatedly criticize them for not uncovering more information, the fact is that, unless there is sufficient evidence to institute formal proceedings against a particular family, Respondents' efforts all depend on the voluntary cooperation of that family. Thus, while it is easy to argue that they should have insisted that Mr. DeShaney provide them with certain information or that

[26] The natural hesitancy of social workers to terminate parental rights or seek other similarly intrusive measures is plainly not, in itself, an impulse to be condemned, especially in light of the fact that premature termination of parental rights would be separately actionable under § 1983. *See, e.g., Hodorowsky v. Ray*, 844 F.2d 1210 (5th Cir. 1988).

he do certain things, Respondents had to walk a delicate line. If they had pushed too hard, further access to the DeShaney family could have been cut off altogether. Under such circumstances, Respondents cannot be found to have been deliberately indifferent to Petitioners' rights.[27]

It is helpful to point out in this regard that the actions for which Respondents are being criticized are plainly less culpable than those found insufficient to establish liability in *Davidson*, *supra*. In that case, a prisoner had advised the Assistant Superintendent in writing of a threat against him. The official sent the note to a guard, but no action was taken by either, and the prisoner subsequently suffered serious injury when the threat was carried out. On these facts the Court concluded that, "[f]ar from abusing governmental power, or employing it as an instrument of oppression, Respondent Cannon mistakenly believed that the situation was not particularly serious and Respondent James simply forgot about the note." 474 U.S. at 348. Certainly nothing worse can be said of Respondents' intentions in this case.

For good reason, this Court in fashioning rules for constitutional liability has always been "hesitan[t] to critique in hindsight" the difficult decisions of officials who must weigh the kind of "competing obligations" that Respondents faced in this case. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). If mistakes do occur in such circumstances, they are the province of State tort law and simply do not rise to the level of a constitutional violation. Accordingly, Respondents are entitled to judgment as a matter of law because, on the facts as alleged, they cannot be found to have had the requisite intent for a due process violation.

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[27] Indeed, Respondents proffered expert testimony to the effect that their actions were proper and in accordance with recognized professional standards. (J.A. at 154-55.)

III. SINCE NO GOVERNMENTAL POLICY OR CUSTOM INFLICTED THE INJURIES COMPLAINED OF, PETITIONERS HAVE NO SECTION 1983 CLAIM AGAINST THE WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES OR WINNEBAGO COUNTY.

If, despite the hurdles of state action and intent, Section 1983 liability may still lie in this case, an issue remains as to whether any policy of Winnebago County or its Department of Social Services caused the harms alleged by Petitioners. Ironically, although a governmental entity may not be held liable under Section 1983 in the absence of such a "policy or custom," *Monell*, *supra*, Petitioners recognize that in this case, the government's policy was in direct opposition to the harms alleged. As their brief explicitly notes, "the state and county had expressed *specific policies and intentions to seek out and prevent child abuse.*" Br. at 19 (citing to County policies) (emphasis supplied). For this reason alone, the claims against the County and its agency were properly dismissed. *See, e.g., Dodson*, *supra*, 454 U.S. at 327.

Even without this directly contrary policy, the County and the Department could still not be held liable here. In the wake of *Monell*, the Court has recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *Tuttle*, *supra*, 471 U.S. at 823. The Court has therefore held that "[m]unicipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, *supra*, 475 U.S. at 481. The "fact that a particular official—even a policymaking official—has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* at 481-82. Municipal liability at-

taches under § 1983 only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483.

Under these principles, none of the allegations in Petitioners' Complaint suffice to state a violation of Section 1983 by either the County or the Department. Petitioners alleged only that the County and Department followed a "policy, custom and practice" of delegating to Ann Kemmeter and her immediate supervisor, Cheryl Stelse, the "authority, power, right and responsibility to make decisions and take actions for and on behalf of the said public entities." (J.A. 10.) Petitioners also attempted to attribute the acts of the individual social workers to the County and Department by alleging that they "authorized, approved, ratified, condoned and adopted the decisions, actions and omissions of the individual defendants" and that said "policies, decisions, actions and omissions" violated the Petitioners' civil rights. (J.A. 10-11.)

These wholly conclusory allegations are legally insufficient to implicate the County or the Department in this lawsuit.[28] As a plurality of the Court recognized last Term in *Praprotnik*, *supra*, "[s]imply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." 108 S. Ct. at 927. Additionally, "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation

[28] Respondents moved for dismissal of the Winnebago County Department of Social Services and Winnebago County in the District Court on the basis that Petitioners had failed to allege a sufficient "policy or custom." The pleadings did not comply with *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985), which held that mere allegations or legal conclusions wholly devoid of facts required a dismissal of a *Monell* "policy" claim. This aspect of Respondents' Motion was not addressed by the District Court.

of policymaking authority." *Ibid.* In short, neither governmental entity can be held liable in this case because of its failure to prevent a discretionary decision made by one of the large number of front-line social workers in its employ.

The plurality in *Praprotnik* also emphasized that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 925. In that regard, § 46.22, Wisc. Stats., which is applicable to Winnebago County, provides that the County Board of Welfare "shall be a policymaking body determining the broad outlines and principles governing the functions, duties and powers assigned to [the Department of Social Services]." The Department itself is charged under the statute with the "administ[ration of] child welfare services." Nowhere is any policy making authority given to individual social workers under state law. For this reason as well, the highly discretionary decisions of these employees, which is all that is at issue in this case, cannot provide the basis for Section 1983 liability for either the County or the Department.

IV. THE CLAIMS AGAINST THE INDIVIDUAL RESPONDENTS MUST BE DISMISSED BECAUSE THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

Yet another impediment to Section 1983 liability prevents the individual social workers from being held responsible for monetary damages in this case. Because these individuals acted with the requisite good faith that protects them from personal liability for the official actions that they either took or declined to take, they are entitled to qualified immunity.

Qualified immunity is afforded to public officials as an accommodation to the "conflicting concerns" of, on one hand, public officials seeking freedom from personal monetary liability and harrasing litigation and, on the

other hand, injured persons seeking redress for the abuse of official power. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). This accommodation provides public officials performing discretionary functions with protection against liability for damages as long as they acted with "objective legal reasonableness," assessed in the light of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra*, 457 U.S. at 818. The Court has also made clear that an individual does not forfeit his immunity even if his conduct might violate clearly established state law requirements so long as the conduct does not run afoul of clearly established constitutional principles. *Davis v. Scherer*, 468 U.S. 183, 190 (1984).

The individual respondents in this case acted in good faith. As the course of events demonstrates, they continued to provide voluntary family services to the DeShaney family for a period of more than a year after their initial contact with Joshua DeShaney. Far from indicating bad faith, their efforts reflected particular sensitivity to the only constitutional rights that had at the time been clearly established—*i.e.*, those of Petitioner's father. *See, e.g., Stanley, supra*; *Santosky, supra*. Indeed, both courts below ruled that the actions in question did not amount to a constitutional violation, thereby confirming Respondents' objective reasonableness at the time they acted. *See also* n.17 *supra* (citing other cases finding no violation). Thus, even if the Court were inclined to fashion a new rule of constitutional liability for a State's failure to intervene effectively in a child abuse case, the individual Respondents in this case should not be held liable for activities that they engaged in several years ago, when such a rule was plainly not foreseeable.[29]

[29] Since Respondents clearly satisfy the qualified immunity standard, there is no need to decide here whether officials like Respondents, who are called upon to make determinations that bear upon the proposed termination (or non-termination) of parental rights, are entitled to absolute immunity as are prosecutors. *Compare Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir.) (absolute immunity), *cert. denied*, 108 S. Ct. 98 (1987); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.) (same), *cert. denied*, 107 S. Ct. 107 (1986); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1986) (same), *with Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987) (qualified immunity); *Hodorowski v. Ray, supra* (same).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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